

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1036**

State of Minnesota,
Respondent,

vs.

Gerardo Elias Martinez, Jr.,
Appellant.

**Filed April 24, 2023
Reversed and remanded
Bratvold, Judge**

Blue Earth County District Court
File No. 07-CR-22-41

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Patrick R. McDermott, Blue Earth County Attorney, Megan E. Gaudette Coryell, Assistant
County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Bratvold, Judge; and Bryan,
Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this direct appeal from a conviction for fleeing a police officer in a motor vehicle,
appellant challenges the district court's restitution order of \$9,068.20. Appellant raises two
issues, arguing that the district court abused its discretion because, first, it awarded

restitution without expressly stating that it had considered appellant's ability to pay, and second, the record did not include sufficient information about appellant's ability to pay. Precedent establishes that the district court must expressly state it considered a defendant's ability to pay before awarding restitution, and the district court failed to do so here. Thus, we reverse and remand. Because the district court may reopen the record on remand, we need not decide the second issue.

FACTS

Respondent State of Minnesota charged appellant Gerardo Elias Martinez Jr. with fleeing a peace officer in a motor vehicle under Minn. Stat. § 609.487, subd. 3 (2020), and driving while impaired (DWI) under Minn. Stat. § 169A.20, subd. 1(7) (2020). Martinez entered into a plea agreement with the state, signed a plea petition, and at a hearing, pleaded guilty.¹

During the plea hearing, Martinez testified about a January 2022 incident that occurred while he was driving in Blue Earth County. Law enforcement observed that Martinez's vehicle did not have a red cover on one taillight, turned on the squad car's overhead lights, and attempted a traffic stop. Martinez did not stop and instead increased his speed. Law enforcement pursued Martinez while he ran stop signs and reached speeds of 115 miles per hour. Eventually, law enforcement attempted a pursuit-intervention-technique (PIT) maneuver, causing Martinez's vehicle to come to a

¹ The state also charged Martinez with fifth-degree possession of a controlled substance under Minn. Stat. § 152.025, subd. 2(1) (2020), and fleeing a peace officer by means other than a motor vehicle under Minn. Stat. § 609.487, subd. 6 (2020). Under the plea agreement, the state agreed to dismiss these two counts.

stop. Martinez admitted to smoking methamphetamine and being under its influence while driving.

The district court accepted Martinez's guilty plea and set a sentencing hearing. The state filed two affidavits for restitution, one from the Minnesota Counties Intergovernmental Trust seeking \$8,068.20 and one from Blue Earth County Finance seeking \$1,000. The affidavits attested to the cost of repairs to the squad car that was damaged while pursuing Martinez.

Probation filed a presentence-investigation (PSI) report, which recommended a restitution award of \$9,068.20 and also stated that if Martinez "chooses to execute his commitment," restitution should "be paid out of prison earnings." The PSI report specified that Martinez "has not maintained steady employment for the last five years" and that "his last employment was Burger King . . . in January 2021," where he worked for "three to four months until he started using drugs and left." The report also noted that Martinez has "to pay child support but is behind on payments" and "would like the amount lowered."

On April 25, 2022, the district court held a sentencing hearing. The district court noted it had received "the pre-sentence investigation, worksheet, as well as the affidavits of restitution." Martinez's attorney did not object to restitution and asked that the district court "consider not imposing an additional fine" because of the "amount of the restitution."

After stating it reviewed Martinez's PSI report and sentencing worksheet, the district court adjudicated Martinez guilty of the two remaining counts and sentenced him to 17 months in prison. The district court "ordered [Martinez] to pay restitution in the

amount of \$9,068.20 that is to be paid out of any prison earnings” by April 25, 2024, and stated it was “not imposing a fine . . . due to the large amount of restitution.”²

Martinez appeals.

DECISION

Appellate courts “review a restitution order for an abuse of the district court’s broad discretion.” *State v. Wigham*, 967 N.W.2d 657, 662 (Minn. 2021) (quotation omitted). The district court’s discretion “is constrained by the statutory requirements set forth in Minn. Stat § 611A.045” (2022). *Id.* Whether the district court had the authority to order restitution is a question of law that appellate courts review de novo. *Id.*

“A victim of a crime has the right to receive restitution as part of the disposition of a criminal charge . . . against the offender if the offender is convicted” Minn. Stat. § 611A.04, subd. 1(a) (2022). Minn. Stat. § 611A.045 governs the district court’s decision on restitution. Three parts of this statute are relevant to the issues raised here. First, “in determining whether to order restitution and the amount of the restitution,” the district court “shall consider” (1) “the amount of economic loss sustained by the victim as a result of the offense” and (2) “the income, resources, and obligations of the defendant.” Minn. Stat. § 611A.045, subd. 1(a). Second, the PSI report “must contain information pertaining to the factors set forth in subdivision 1” of the statute. *Id.*, subd. 2. And third, a restitution order

² On June 13, 2022, the district court issued a written sentencing order detailing Martinez’s convictions, 17-month sentence, and restitution of \$9,068.20. The district court had issued two prior written sentencing orders that erroneously listed restitution as \$7,068.00.

must contain “a payment schedule or structure” that “consider[s] relevant information supplied by the defendant.” *Id.*, subd. 2a.

In *Wigham*, the supreme court reversed and remanded a restitution award because the district court failed to fulfill its statutory duty to consider the defendant’s ability to pay. 967 N.W.2d at 664, 666. In doing so, the supreme court held that the “district court fulfills its statutory duty to consider a defendant’s income, resources, and obligations in awarding and setting the amount of restitution when it *expressly states*, either orally or in writing, that it considered the defendant’s ability to pay.” *Id.* at 664 (emphasis added). The district court need not “make specific findings about the defendant’s income, resources, and obligations to support [its] express statement that it considered the defendant’s ability to pay,” but doing so is “best practice.” *Id.* at 665 & n.6. Even if the district court makes specific findings, “the record must include sufficient evidence about the defendant’s income, resources, and obligations to allow a district court to consider the defendant’s ability to pay the amount of restitution ordered.” *Id.* at 665.

In his brief to this court, Martinez argues that the district court “failed to fulfill its [statutory] obligation because [it] did not expressly state either orally at sentencing or in writing in the written sentencing orders that [it] had considered Martinez’s ability to pay the requested restitution.” The state contends that the district court considered Martinez’s ability to pay in three ways, which we discuss in turn.

The state first argues that the district court considered Martinez’s ability to pay by reviewing the PSI report, which “contained information regarding [Martinez’s] income and employment,” and by determining that Martinez “was financially unable to obtain counsel”

when the district court appointed a public defender for Martinez. But this argument rests on the faulty premise that the district court need not expressly state that it considered a defendant's ability to pay restitution. *See Wigham*, 967 N.W.2d at 666 (holding that the district court “must expressly state” it considered the defendant’s “ability to pay—his income, resources, and obligations—when ordering restitution”). Thus, neither the district court’s review of the PSI report nor its appointment of a public defender, which occurred before the sentencing hearing, satisfied the district court’s statutory duty to expressly state it considered Martinez’s ability to pay restitution.

Second, the state relies on the district court’s statement that restitution should be paid out of Martinez’s prison earnings as showing the district court considered Martinez’s ability to pay restitution. The state cites *State v. Tenerelli*, 583 N.W.2d 1 (Minn. App. 1998), *aff’d as modified by* 598 N.W.2d 668 (Minn. 1999), which significantly predates *Wigham*. In *Tenerelli*, we determined that the district court’s reference to the defendant’s prison earnings as the source of restitution payments showed it had considered the defendant’s ability to pay. 583 N.W.2d at 3. But the supreme court adopted a bright-line rule in *Wigham*, stating it sought to “avoid[] the need to scour bits and pieces of information to try to glean what the district court may have considered.” 967 N.W.2d at 664 n.5 (emphasis omitted). *Wigham* teaches that the district court’s reference to Martinez’s prison earnings does not fulfill its statutory duty under Minn. Stat. § 611A.045.

For the same reason, we reject the state’s third argument, which urges us to conclude that the district court’s decision not to fine Martinez also shows the district court considered Martinez’s ability to pay restitution. The district court’s statement that it was “not imposing

a fine . . . due to the large amount of restitution” does not “expressly” state it considered Martinez’s “ability to pay” restitution. *See id.* at 666.

In sum, we conclude that because the district court did not expressly state it considered Martinez’s ability to pay, it failed to fulfill its statutory duty to consider the income, resources, and obligations of the defendant and abused its discretion in ordering restitution. Thus, we reverse and remand. In considering restitution on remand, the district court may in its discretion reopen the record and order an updated PSI report to include information on Martinez’s income, resources, and obligations.³ As a result, we need not consider whether this record contains sufficient information about Martinez’s income, resources, and obligations to allow the district court to consider his ability to pay.

Reversed and remanded.

³ We also note that if district court orders restitution, it must comply with the statutory requirement that the restitution order either contain a payment schedule or assign the responsibility for developing a schedule to another. Minn. Stat. § 611A.045, subd. 2a.